Supreme Court, U. S.
FILED
OCT 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-618

WILLIAM THOMAS PINNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH GLENN YOUNG
JOHN F. ROSCOW, III
Scruggs, Carmichael, Long,
Tomlinson, Roscow, Pridgeon,
Helpling & Young
Post Office Drawer C
One Southeast First Avenue
Gainesville, Florida 32602
Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0626

INDEX

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT:

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES AND DECISIONS OF OTHER COURTS OF APPEALS. 6

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN THE DAY TO DAY ADMINISTRATION OF JUSTICE. 9

CONCLUSION 10

APPENDIX (Opinions, Judgment and Denial of Rehearing of Court of Appeals and Trial Court Findings) 1a

CITATIONS

Cases:

H. Hackfeld & Co. v. United States, 197 US 442 (1905) 7,8,9

Jackson v. United States, 330 F.2d. 679 (8th Cir. 1964) 8

Swift & Co. v. Hocking Valley Ry. Co., 243 US 281 (1917) 9

United States v. Campbell, 453 F.2d 447 (10th Cir. 1972) 8
United States v. Houston, 547 F.2d 104 (9th Cir. 1976) 8
United States v. Kahriger, 210 F.2d 565 (3rd Cir. 1954) 8
United States v. Pinner, 561 F.2d 1203 (5th Cir. 1977) 2,4,5,6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

WILLIAM THOMAS PINNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner William Thomas Pinner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 7, 1978.

OPINIONS BELOW

The opinions of the Court of Appeals appear in the Appendix hereto. The first opinion is reported as *United States v. Pinner*, 561 F.2d 1203 (5th Cir. 1977). The second *per curiam* opinion is not yet reported. No opinion was rendered by the District Court for the Middle District of Florida, however, findings of fact and conclusions of law, which appear in the appendix, were made on March 8, 1977 and on February 23, 1978. The District Court's first findings are set forth in note 2 of the reported opinion of the Fifth Circuit.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 7, 1978. A timely filed petition for rehearing and rehearing *en banc* was denied on September 11, 1978. This petition for certiorari was filed within 30 days of that denial. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether stipulated facts introduced in a criminal case as the government's only evidence may be disregarded by the trial court, acting as the trier of fact, almost one year after the defense has rested its case, in order to sustain the trial court's verdict of guilt, where the facts, which were stipulated as being true, prove the

innocence of the Defendant, as stated by the Fifth Circuit Court of Appeals in its opinion rendered in the appeal of this case?

STATUTORY PROVISION INVOLVED

United States Code, Title 26:

§7203. (In Pertinent Part)
"Any person . . . required by this title . . . to make a return . . . who willfully fails to . . . make such return . . . shall . . . be guilty of a misdemeanor . . . ."
(Full text of statute set forth in appendix in note 1 of opinion.)

STATEMENT OF THE CASE

An information charging six counts of willful failure to file employer's quarterly federal tax returns, a violation of 26 U.S.C. §7203, was filed in Jacksonville, Florida on January 3, 1977, against William Thomas Pinner.

Before trial a stipulation of facts was entered into between the Government and the defense. The preamble to the facts stipulated reads as follows:

Stipulation

"It is hereby stipulated and agreed for the purpose of this action by and between the plaintiff, UNITED STATES OF AMERICA, by its attorney, Lee S. Carlin, and the defendant, WILLIAM THOMAS PINNER, by his attorneys, James L. Tomlinson and Joseph G. Young,

that all of the facts stated herein and all of the statements contained in the exhibits attached hereto and incorporated by reference into this Stipulation are true, complete and correct and that this Stipulation with all of the attached exhibits may, during the trial of this cause, be offered into evidence by either party without objection, reserving to each party the right to offer at the trial evidence which is competent, material, relevant and admissible pursuant to the Federal Rules of Evidence effective 1 July 1975, and permitted by the terms and conditions of the Omnibus Order entered in this cause 27 January 1977, and which may tend to explain the transaction, the intent of the parties, or which may have any bearing on the element of willfulness or which may negate the element of willfulness." (Stip. first unnumbered paragraph).

"The trial was tried on stipulations which allowed the Government to introduce two exhibits, ... The Government then rested its case without introducing any testimony. Counsel for appellant [WILLIAM THOMAS PINNER] then made a Motion for Judgment of Acquittal pursuant to Rule 29(a), F.R.Crim. P., and for Special Findings of Fact under Rule 23(c), F.R.Crim. P. The motions were denied. Defense then rested without introducing any testimony or evidence and renewed the Motion for Judgment of Acquittal. After argument, Pinner was found guilty on each of the six counts with which he was charged. Defense counsel again asked the Court for Special Findings of Fact and the Court granted this request. . . ." *United States v. Pinner,* 561 F.2d 1203, 1204 (5th Cir. 1977).

On appeal the Appellate Court remanded this case back to the Trial Court, although retaining jurisdiction for such later review as appropriate, for specific findings as to credibility stating:

> "In this case, the trial judge did not make either a specific written finding or a comment from the bench clearly announcing his findings as to appellant's credibility during his interviews with the I.R.S. This finding is especially important because appellant's belief that he did not have to file if he was not able to pay the tax owed is a recognized legal defense against the element of 'willfulness'. (Citations omitted) We therefore remand to the trial judge for a specific finding with respect of Pinner's credibility." *Pinner,* at 1206.

Additionally the Fifth Circuit asked for specific findings as to " 'why' Pinner did not file" noting that:

> "If the appellant [WILLIAM THOMAS PINNER] did not file because he mistakenly believed he could not without simultaneously paying the tax due, he must be acquitted." *Pinner,* at 1207 n.8.

The Trial Court, as the trier of fact, responded that the statements of the Defendant, WILLIAM THOMAS PINNER, which were contained in the stipulation and which had been stipulated to as being true were "unworthy of belief" and again adjudicated Pinner guilty.

Thereafter the Court of Appeals affirmed the Trial Court stating:

> "PER CURIAM: In an earlier opinion we remanded this matter to the district court for specific findings as to the credibility of the defendant's statements and application of appro-

priate legal standards. *United States v. Pinner,* 561 F.2d 1203 (5th Cir. 1977). This has been done. Because these findings were against the defendant and he was again adjudged guilty of the offenses charged, he appeals. Finding no error we affirm."

REASONS FOR GRANTING THE WRIT

I.
THE DECISION BELOW CONFLICTS WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES AND DECISIONS OF OTHER COURTS OF APPEALS.

In the case *sub judice* both of the decisions of the Court of Appeals were silent with reference to the stipulated truth of all of the statements contained in the only evidence the Government introduced at trial. However, the Appellate Court in its decision did point out to the Trial Court, on remand for a special finding of fact on the credibility of such statements, that if certain statements were true, WILLIAM THOMAS PINNER should be acquitted. Since the Trial Court found these statements "unworthy of belief" and the Appellate Court affirmed the conviction of the defendant based on such finding, it is apparent that the Appellate Court must have been of the opinion that the Trial Court was not bound by the stipulation to the truth of the statements introduced into evidence by the Government.

Certainly the result of ignoring the stipulated truthfulness of such statements by both the Appellate

Court and the Trial Court had the effect of allowing the Trial Court to render an independent and contrary judgment on the factual question of truthfulness.

This is not the first time that a writ of certiorari has been sought under substantially similar circumstances.[1] In *H. Hackfeld & Co. v. United States,* 197 US 442 (1905) the circuit court concluded that a stipulation of facts were not binding on the trial court. This Court granted certiorari and in the opinion in that case stated that:

> "We cannot take this view of the case. It may be conceded that where the facts are all stated the court cannot be concluded by a stipulation of the parties as to the legal conclusions to be drawn therefrom, but we know no rule of public policy which will prevent the United States attorney from stipulating with the defendant in a case of this character as to the ultimate facts in the controversy. It is to be presumed that such an officer will do his duty to the government, and not stipulate away the rights of the prosecution." *****
>
> "We think the parties are entitled to have this case tried upon the assumption that these ultimate

[1] "The conviction was upon information filed and trial had to the court, a jury having been waived, and upon a stipulated finding of facts, agreed upon by the attorney for the United States and the petitioner. * * * * * The circuit court of appeals disposed of this case upon the view that the judgment of conviction would have been warranted upon the evidentiary facts stipulated, and that the stipulation, in so far as it stated that the escape of the immigrants could not have been reasonably anticipated by the master or officers of the steamship, and did not occur by reason of any negligence or want of proper care upon their part, was the statement of a mere conclusion not binding upon the court, and would not prevent it from rendering an independent judgment upon the facts stated." *H. Hackfeld & Co. v. United States,* 197 U.S. 442, 443-446 (1905).

facts, stipulated into the record, were established, no less than the specific facts recited." *H. Hackfeld & Co. v. United States,* 197 U.S. 442, 446-447 (1905).

After an analysis of the federal statute involved in view of the stipulated facts, this Court, in *H. Hackfeld & Co.,* reversed and remanded this case with instructions to discharge the petitioner, thereby entering the United States Supreme Court opinion with which the result of the decision in the case *sub judice* is in direct conflict.

Similar conflict is also found in the Circuits. Among the Circuit Courts of Appeals four (4) circuits have, in criminal cases, also taken emphatic positions following the concept set forth in the *H. Hackfeld & Co.* decision. "The United States was conclusively bound on the facts stated in the stipulation as indeed, under the circumstances, was the court below." *United States v. Kahriger,* 210 F.2d 565, 571 (3rd Cir. 1954). "Stipulations are the equivalent of proof and prevent an independent examination by a judicial officer or body with respect to the matters stipulated." *Jackson v. United States,* 330 F.2d 679, 681 (8th Cir. 1964). "Stipulations as to facts freely and voluntarily entered into during trial are the equivalent of proof and on appeal neither party will be heard to suggest that the facts were other than as stipulated." *United States v. Campbell,* 453 F.2d 447, 451 (10th Cir. 1972). "When parties have entered into stipulations as to material facts, those facts will be deemed to have been conclusively established." *United States v. Houston,* 547 F.2d 104, 107 (9th Cir. 1976).

These conflicts justify the grant of certiorari to review the judgment below.

II.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN THE DAY TO DAY ADMINISTRATION OF JUSTICE.

Stipulations are an integral part of the judicial process. Litigants can use stipulations in every phase of legal proceedings to facilitate the administration of justice. Savings of time and expense, both for the Courts and the litigants may be achieved through the use of stipulations in the place of other more cumbersome forms of proof. In short, stipulations should be favored and their use encouraged by the courts.

The place of stipulations in today's American jurisprudence however, remains unclear and uncertain, as is evidenced by the result obtained in the case *sub judice*. From the written opinions of the Fifth Circuit in this case it would appear that the only factor remaining to determine the innocence of WILLIAM THOMAS PINNER is the truth of his statements. This was the subject of the stipulation and therefore one would think this issue would be resolved in accordance with the stipulation and therefore an acquittal would be required. However, this was not the case. Instead the Fifth Circuit ignored the stipulation and asked the Trial Court to make a finding of fact on the precise point stipulated to by the litigants. Once the Trial Court made a finding of fact contrary to the facts stipulated, the Trial Court's findings were sustained by the Appellate Court over the stipulation entered into by the parties.

In 1905 one side of the stipulation coin was cast in this Court's decision in *H. Hackfeld & Co.*, at 447:

> "We think the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record, were established, no less than the specific facts recited."

The other side of that same coin was cast by this Court in 1917 in the case of *Swift & Co. v. Hocking Valiey Ry. Co.*, 243 US 281 (1917). In *Swift & Co.*, at 289, this Court treated a stipulation as a nullity stating that:

> "If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law."

The result of the Fifth Circuit's decision in the case *sub judice* was the equivalent to treating the stipulation entered into between the Government and the defendant as the type of stipulation condemned in *Swift & Co.* This type of classification in this case appears to be wrong.

It is respectfully submitted that a clarification of the application of the principals set forth in *H. Hackfeld & Co.* and *Swift & Co.* related to the scope of permissible stipulation would be appropriate and beneficial to the administration of justice. Such a clarification made prior to the decisions rendered in the case *sub judice* may have made it unnecessary to appear before the Fifth Circuit Court of Appeals through the submission of two sets of briefs and to submit this petition for a writ of certiorari to this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

JOSEPH GLENN YOUNG
JOHN F. ROSCOW, III
Post Office Drawer C
One Southeast First Avenue
Gainesville, Florida 32602

Attorneys for Petitioner

October 11, 1978

APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

William Thomas PINNER,
Defendant-Appellant.

No. 77-5174
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Oct. 27, 1977.

In a nonjury trial, defendant was convicted before the United States District Court for the Middle District of Florida, John H. Wood, Jr., J., of willfully failing to file employer's quarterly federal tax returns, and he appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) although requested special findings may be written or gleaned from comments from the bench they must afford a basis for intelligent appellate review; (2) remand for further consideration was required where trial judge did not make either a specific written finding or comment from the bench clearly announcing his findings as to defendant's credibility, especially since defendant's belief that he did not have to file if he was not able to pay constitutes a recognized defense to

*Rule 18, 5 Cir.; *See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

the element of willfulness, and (3) in responding to a motion for judgment of acquittal the trial judge must ask himself whether he finds that a reasonably minded jury must necessarily entertain a reasonable doubt.

Vacated and remanded for additional proceedings.

1. Criminal Law 1181

Proceedings in connection with prosecution for willfully failing to file employer's quarterly federal tax returns were remanded for further consideration where trial judge did not make either a specific written finding or a comment from the bench clearly announcing his finding as to defendant's credibility, which finding was especially important since defendant's belief that he did not have to file if he was not able to pay the tax owed is a recognized defense against element of willfulness; furthermore, court's statements made it difficult to decide whether the correct rule of law for evaluating circumstantial evidence was applied. 26 U.S.C.A. (I.R.C.1954) §7203; Fed. Rules Crim. Proc. rules 23(c), 29(a), 18 U.S.C.A.

2. Criminal Law 870

A defendant's request for special findings must be granted; although such findings may be written or gleaned from comments from the bench, they must afford a basis for intelligent appellate review. Fed. Rules Crim. Proc. rule 23(c), 18 U.S.C.A.

3. Internal Revenue 2406

Belief that one does not have to file an employer's quarterly federal tax return if he is not able to pay the

tax owed is a recognized legal defense against the element of "willfulness" in a prosecution for willfully failing to file such returns. 26 U.S.C.A. (I.R.C.1954) §7203.

4. Criminal Law 753.2(6)

In responding to a defendant's motion for judgment of acquittal the trial judge must ask whether on the evidence at hand he finds that a reasonably minded jury must necessarily entertain a reasonable doubt; if the answer is in the negative, then the motion should be denied; in the latter case, if the trial judge is the fact finder he must, using the correct legal principles, then determine whether or not he was convinced the government had established each element beyond all reasonable doubt.

Joseph G. Young, John F. Roscow, III, Gainesville, Fla., for defendant-appellant.

John L. Briggs, U.S. Atty., Lee S. Carlin, Asst. U.S. Atty., Jacksonville, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before GOLDBERG, RONEY and FAY, Circuit Judges.

FAY, Circuit Judge:

Appellant, William Thomas Pinner, appeals his conviction in a non-jury trial on six counts of willfully failing to file employer's quarterly federal tax returns in

violation of 26 U.S.C. §7203.[1] The trial was tried on stipulations which allowed the Government to introduce two exhibits, (description below). The Government then rested its case without introducing any testimony. Counsel for appellant then made a Motion for Judgment of Acquittal pursuant to Rule 29(a), F.R.Crim.P., and for Special Findings of Fact under Rule 23(c), F.R.Crim.P. The motions were denied. Defense then rested without introducing any testimony or evidence and renewed the Motion for Judgment of Acquittal. After argument, Pinner was found guilty on each of the six counts with which he was charged. Defense counsel again asked the Court for Special Findings of Fact and the Court granted this request by entering the document set out in the margin.[2]

---

[1] "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." 26 U.S.C. §7203.

[2] Document entered by Trial Court pursuant to Motion for Special Finding of Fact:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On this the 8th day of March, 1977, came on for trial the above styled and numbered cause and the Court, pursuant to the request of counsel made under Rule 23(c) of the Federal Rules of Criminal Procedure, hereby enters its Findings of Fact and Conclusions of Law.

1. During the periods covered by each of the six Counts of the Information defendant was required to make a return of Federal

(continued)

Appellant raises three assignments of error, all of which we find to have some merit, and on this basis we remand to the trial court for findings consistent with this opinion.

FACTS

Appellant opened Bill Pinner Footwear in March, 1968, as a sole proprietorship which operated at a loss until approximately two years ago. During the last two quarters of 1973 and all four quarters of 1974, appellant failed to timely file the Employer's Quarterly Federal Tax Return, Internal Revenue Form 941.

At trial, the only evidence consisted of two exhibits submitted by the Government. Exhibit 1 contained summaries of interviews by Internal Revenue representatives with appellant.

The first interviews, in March, 1974, were with Kathy Howell, Taxpayer Service Representative for

(footnote continued from preceding page)

Income Taxes withheld from wages and Federal Insurance Act taxes pursuant to 26 U.S.C., Section 6001 et seq.

2. The defendant for each of the six periods in question failed to make a timely tax return.

3. The defendant's failure to make a timely Income Tax Return for each of the taxable periods in question was a knowing and willful failure.

4. Pursuant to the above, the defendant should be found guilty of each of the six counts contained in the Information and Judgment should be entered accordingly.

ENTERED this 8th day of March, 1977 at Jacksonville, Florida.

s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE
BY DESIGNATION

the Internal Revenue Service. At that time Pinner acknowledged he had not filed the required returns.[3]

In March, 1975, IRS Revenue Officer Lynn D. Mathis interviewed appellant concerning all six quarters.[4] Two months later the investigation intensified and Special Agent Larry E. Wine, Department of the Treasury and Revenue Officer Mathis contacted appellant concerning the forms not filed. Exhibit 1 contains a summary of this interview set forth by Agent Wine.[5]

[3] "Again while I do not recall the specific conversations with Mr. Pinner I can state from the absence of any notations that Mr. Pinner did not present any questions concerning his requirement to file or pay. Should he have presented any questions I would have answered them or referred him to the Gainesville office and made a notation to that effect on the TDI. Should there have been any questions concerning his ability to pay the taxes I would also have made a notation on the TDI and informed him that even if he couldn't pay to go ahead and file the returns and he could go over payment with the Revenue Officer once a TDA had been issued. I do not recall any explanations or comments that may have been made by Mr. Pinner as to why he had not filed these returns." (Stip. ¶ 13, Ex. E-1.)

[4] "When I asked him why this happened [the non-filing of the Forms 941 for the six enumerated quarters], he volunteered that he was fully aware that the delinquent returns should have been filed and paid but he was solely responsible for their preparation and pressing business affairs, procrastination, and shortage of working capital were the only reasons the returns had not been filed or paid." (Stip. ¶ 14, Ex. F-1.)

[5] "Pinner stated: 'I think I've got enough money. I started to file four or five times, but got shortcutted every time. I made deposits on the first quarter of 1975, but haven't filed the return yet.' When asked if he had been contacted previously concerning employment tax returns, Pinner responded: 'Yes, I was contacted by Revenue Officer Hutchinson of the local IRS office.' He did not recall any prior contacts with Revenue Officer Dobbins. He did not recall which quarters prior to the third quarter of 1973 that he had problems with. Pinner did not recall any of the prior Revenue Officers (Hutchinson or Dobbins) advising him that

(continued)

Several days later, on May 9, 1975, Agent Wine again contacted appellant to return records provided

(footnote continued from preceding page)

he could file the returns without including payment and when asked if he knew he could file without payment, he stated: 'No, I thought I had to have the money to file.' He did not recall that he had never been advised not to file any returns. Pinner said he did not initiate a contact with any IRS personnel and that after Revenue Officer Mathis' contacts, he 'felt like speaking with Mr. Mathis, I needed to do something faster than that (like) selling stocks' but he just didn't make any contacts. When asked why he did not file the returns, Pinner stated: 'I guess I was going in too many directions, but I must have thought a miracle or something was going to happen. I guess I was too involved in Mary's business and Gator Shoe Repair, working until one or two in the morning. I procrastinated.' I asked him what course of action he planned to take in respect to preparing and filing the returns. He said he did part of the forms either at the end of the quarter or at the end of the year in order to prepare the employee's W-2's. He also said he was just going to let it slide. When asked if he discussed the failure to file with his C.P.A., John Almeida of Moore, Cobb & Co., he stated: 'No sir, if I'd done that, I wouldn't be in this shape now.' Almeida died five or six months ago. Pinner did discuss the sale of his Atlantic Bank stock with Almeida who offered him half of what it cost. He decided that he would take such a beating he decided not to sell his stock. He did not think anyone else besides he and Almeida was aware of their conversation. He did discuss the stock with some other people, but didn't recall their names. Almeida prepared his 1973 Form 1040 and the firm is currently preparing his 1974 Form 1040 and a current financial statement. When asked why he didn't have his C.P.A. prepare his 941's, he stated: 'Frankly, I felt like I couldn't afford it.'

"For the July 1, 1973 to December 31, 1974 time period, Pinner said he paid his employees 'hourly only'. He deducted FICA and withholding from his employees' wages and when [sic] asked if he used Circular E to determine the amounts of FICA and withholding stated: 'Yes, I used Circular E, I looked up the amounts to withhold myself.' He did not read any portion of Circular E, rather simply used the tax tables in this publication. Pinner personally prepared, endorsed, and gave his employees their payroll checks. He was aware of the requirement to deduct withholding tax and FICA and did the same. When further asked if he was aware that he was a trustee for those withheld funds,

(continued)

by appellant. At that time appellant stated, "I could have filed, but I didn't" for which a specific question had not been asked to elicit that response. Agent Wine asked Pinner if he was aware that he could have filed the returns without including payment to which Pinner responded, "At the time I was not aware I could file without paying." The last comment set forth by Agent Wine in his interview summary was made after Wine explained that he could have filed without including payment. Pinner's response was, "I didn't understand."

(footnote continued from preceding page)

Pinner said: 'Yes sir, I was aware they had to be paid'. When asked if he was aware that the 941's had to be filed within thirty days of the end of the quarter, he replied: 'Yes, sir'. Pinner volunteered that he should have kept a better grip on the situation and that he 'could probably have borrowed the money but just didn't do it. I approached the First National Since Revenue Officer Mathis' contact and I think I've got the money now to take care of it.'

"Pinner stated that he prepared and gave to his employees Forms W-2 for 1973 and 1974 from the check stubs as he did not keep his payroll ledgers current. He used Form 501 depository cards on some occasions and at first was not certain what periods they were used. He first thought he used the 501's for the first and second quarters of 1973, but later located a bill from Chamblee that would indicate deposits were not made with the 501's. He did not recall using the 501 cards during the July 1, 1973 to December 31, 1974 time period. He thought he also used the cards in 1975 and is making the deposits at the Sun Bank in Gainesville. He filed with State of Florida unemployment tax Forms UCT-6 and included payment with the returns. He said: 'I filed at the end of each quarter, except one.' This quarter was filed late. When asked why he filed the State tax forms and not the Federal forms, he said: 'Because I had the money to do it'. He used estimated payment Forms 1040ES for his personal return. Pinner explained that he was not able to meet these payments but that the amount of 941 taxes was too large to make payments." (Stip. ¶ 15, Ex. H-5-6).

ISSUES

[1] Appellant argues that the Court's entry of the document captioned Findings of Fact and Conclusions of Law was an inadequate response to his request for special findings of fact. Rule 23(c), F.R.Crim.P. We agree.

[2] A defendant's request for special findings must be granted. Although these findings may be written or gleaned from comments from the bench, they must afford a basis for intelligent appellate review. *United States v. Johnson,* 496 F.2d 1131, 1138 (5th Cir. 1974).

[3] In this case, the trial judge did not make either a specific written finding or a comment from the bench clearly announcing his findings as to appellant's credibility during his interviews with the IRS. This finding is especially important because appellant's belief that he did not have to file if he was not able to pay the tax owed is a recognized legal defense against the element of "willfulness".[6] *United States v. Haller,* 543 F.2d 62 (9th Cir. 1976); *United States v. Rosenfield,* 469 F.2d 598 (3rd Cir. 1972). We therefore remand to the trial judge for a specific finding with respect of Pinner's credibility.

During argument for Pinner's Motion for Judgment of Acquittal, the trial judge made several statements[7]

[6]The term "willfully", as used in the Internal Revenue Code provisions proscribing criminal acts, is defined as ". . . a voluntary, intentional violation of a known legal duty." *United States v. Pomponio,* 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12, 14 (1976).

[7]THE COURT: But the circumstantial evidence rule that he is stating there is no longer the test by the Supreme Court.

MR. CARLIN (Government counsel): That's correct, sir.

(continued)

which make it difficult to decide whether he was applying the correct rule of law in evaluating the circumstantial evidence presented by the Government to prove the element of "willfulness".

There has been some confusion and a metamorphosis in the law on circumstantial evidence.

In 1954, the Supreme Court held that it was not necessary for the trial judge to instruct the jury ". . . that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt." *Holland v. United States,* 348 U.S. 121, 139, 75 S.Ct. 127, 137, 99 L.Ed. 150, 166 (1954). ". . . [T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect . . . ." [citations omitted] *Holland,* 348 U.S. at 139-140, 75 S.Ct. at 137.

[4] Since *Holland* this Court has formulated a standard to be used by trial courts in determining

(footnote continued from preceding page)

THE COURT; It does not have to preclude every reasonable hypothesis. In fact, the circumstantial evidence is given the same weight as direct evidence provided the circumstances are strong enough. And generally speaking, that's up to the trier of the facts.

MR. CARLIN: That's correct, sir. The proper test, I believe, Your Honor, is that a reasonable man could find that the inferences exclude a reasonable hypothesis of innocence. (R. 77)

* * * * *

THE COURT: How could you ever establish a case of willful intent? What circumstances would have to exist where the trier of the facts could ever find? Now, if you are going to deal with the question of circumstantial evidence, you don't have to exclude every reasonable hypothesis any longer. The Supreme Court has repeatedly held that that is not necessary any longer. And I refer you to the very recent case of the *United States v. Cortez* [5 Cir.] at 521 F.2d, a 1975 case appearing on page 1, an opinion by Judge Gewin, Goldberg and Dyer. You don't have to negative every reasonable hypothesis. (R. 87-88)

whether a case should be submitted to a jury or whether in a case tried to a judge a motion for judgment of acquittal should be granted. That standard is:

> ". . . if the trial or appellate court is satisfied that the jury could not reasonably conclude that the evidence fails to exclude every reasonable hypothesis but that of guilt then the trial court, or on appeal, this Court must hold that 'the jury must necessarily have had a reasonable doubt as to the inconsistency.' " [citation omitted]

United States v. Haggins, 545 F.2d 1009, 1012 (5th Cir. 1977). Thus in responding to a defendant's motion for judgment of acquittal the trial judge must ask:

> "On this evidence do I find that a reasonably minded jury must necessarily entertain a reasonable doubt?"

Haggins, 545 F.2d at 1013.

If the trial court answers in the negative then the motion should be denied. Then as fact finder and using the correct legal principles the judge must determine whether or not he was convinced the Government had established each element beyond all reasonable doubt.

On the basis of the foregoing we remand this case back to the trial judge for specific findings, particularly as to "why" Pinner did not file,[8] and application of the proper legal principles.

The denial of the motion for judgment of acquittal, the adjudication of guilt, the findings of fact and conclusions of law, and the judgment and commitment are all vacated and the matter remanded for additional proceedings consistent herewith. If further appellate proceedings are necessary, the parties may file a supplemental record with supplemental briefs as this court retains jurisdiction for such later review.

[8] If the appellant did not file because he mistakenly believed he could not without simultaneously paying the tax due, he must be acquitted. If, on the other hand, different factual findings are made, they must be set forth in the record.

FINDINGS OF FACT AND AND CONCLUSIONS OF LAW

On this the 20th [sic] day of February, 1978, came on for hearing the above styled and numbered cause and the Court, after careful consideration of the entire file, record and arguments of counsel and pursuant to the opinion of the Fifth Circuit Court of Appeals entered in the case and in response to the mandate of that opinion now makes these additional Findings of Fact and Conclusions of Law.

1. During the periods covered by each of the six Counts of the Information defendant was required to make a return of Federal Income Taxes withheld from wages and Federal Insurance Act taxes pursuant to 26 U.S.C., Section 6001 *et seq.*

2. The defendant for each of the six periods in question failed to make a timely tax return.

3. There is proof beyond a reasonable doubt in the Stipulation and Government Exhibits 1 and 2 that the defendant's failure to file was willful. In neither of the first three interviews (two telephone and one in person) with Internal Revenue Service representatives concerning his failure to file did the defendant ask any questions about how he could file when [sic] was

unable to pay. Instead, he indicated at the third interview that he was aware the returns should have been filed, and that procrastination and pressing business affairs along with a shortage of working capital were the reasons he had not filed.

This Court finds that the defendant's subsequent remarks during interviews with IRS Special Agent Larry E. Wine that he was unaware he could file without making immediate payment are unworthy of belief when put in the context of his prior interviews and also other remarks made to Agent Wine in which he admitted procrastination was the reason for his failure to file. The defendant even told Agent Wine he was just going to "let it slide". "I could have filed but I didn't."

Had the defendant clearly and repeatedly maintained from the first interview that he did not realize a person could file without paying the taxes due, this Court's decision might be different; however, the defendant did not do that, and now merely seeks to rationalize his behavior.

4. Since [sic] the Court finds that based on the facts in the Stipulation and Exhibits, a reasonably minded jury would not necessarily entertain a reasonable doubt as to defendant's guilt on each of the six counts.

5. Pursuant to the above, the defendant should be found guilty of each of the six counts contained in the Information and Judgment should be entered accordingly.

6. I now address myself to one inquiry of the Court of Appeals, to wit: "On this evidence do I find that a reasonably minded jury must necessarily entertain a reasonable doubt?" And in response to the Court's

inquiry, I find that the Trial Court has absolutely no doubt that a jury would, based on all the evidence adduced on the trial of the case, be compelled to find beyond any and all reasonable doubt that the defendant did in fact intentionally, knowingly, willfully and with specific intent, fail to file his Income Tax Returns as required by law.

ENTERED this 23rd day of February, 1978, at Jacksonville, Florida.

s/ John H. Wood, Jr.

JOHN H. WOOD, JR.
United States District Judge
(By Designation)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5174
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM THOMAS PINNER,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

(July 7, 1978)

BEFORE GOLDBERG, RONEY and FAY, Circuit Judges.

PER CURIAM:

In an earlier opinion we remanded this matter to the district court for specific findings as to the credibility of the defendant's statements and application of appropriate legal standards. United States v. Pinner, 561 F.2d 1203 (5th Cir. 1977). This has been done. Because these findings were against the defendant and he was again adjudged guilty of the offenses charged, he appeals. Finding no error we affirm.

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409. Part I.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5174
Summary Calendar

D. C. Docket No. 77-2-CR-J-S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM THOMAS PINNER,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before GOLDBERG, RONEY and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the

said District Court in this cause be, and the same is hereby, affirmed.

July 7, 1978

Issued As Mandate:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

September 11, 1978

TO ALL PARTIES LISTED BELOW:

No. 77-5174 - UNITED STATES OF AMERICA, V. WILLIAM THOMAS PINNER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, *and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/Brenda M. Hauck
Deputy Clerk

*On behalf of Appellant, Pinner,

BH

cc: Messrs. Joseph G. Young
John F. Roscow, III
Messrs. Lee S. Carlin
John E. Lawlor, III

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

WILLIAM THOMAS PINNER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent,*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

I hereby certify that on this 11th day of October, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to The Honorable John E. Lawlor, III, Assistant United States Attorney, Middle District of Florida, Post Office Box 600, Jacksonville, Florida, Counsel for the Respondent. I further certify that all parties required to be served have been served.

SCRUGGS, CARMICHAEL, LONG,
TOMLINSON, ROSCOW, PRIDGEON
HELPLING & YOUNG

By /s/ JOSEPH G. YOUNG
Joseph G. Young, Esquire
John F. Roscow, III
P. O. Drawer "C"
Gainesville, Florida 32602
Attorneys for Petitioner